

## Ombudsman's Determination

Applicant	Acre Mill Baptist Church ( <b>Acre Mill</b> )
Scheme	Baptist Union Pension Scheme ( <b>the Scheme</b> )
Respondents	Baptist Pension Trust Limited ( <b>the Trustee</b> )

## Outcome

1. I do not uphold Acre Mill's complaint and no further action is required by the Trustee.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Acre Mill has complained that the Trustee of the Scheme has claimed that a cessation event occurred in June 2009, triggering a Section 75 debt. Acre Mill dispute this and have asked the Pensions Ombudsman to determine whether a cessation event occurred in June 2009.

## Background information, including submissions from the parties

4. Acre Mill say that they are a small church and have had a relatively small amount of paid ministry since the late 1960s. In 2004 Acre Mill entered into discussions with another church, Waterbarn Baptist Church (**Waterbarn**), with a view to a shared minister. A minister (**Reverend E**) was appointed from 1 September 2004 and the costs of his ministry were shared equally between Acre Mill and Waterbarn.
5. A Terms of Appointment was drawn up for Reverend E and Acre Mill say that the terms were very specific and a 'contract of service' was not created. Reverend E was appointed as a 'Holder of Office' and not as an employee.
6. In mid-2008 Acre Mill, due to some unexpected financial and building problems, decided that they would not be able to continue with Reverend E's ministry beyond the end of 2009. However, Reverend E decided to end his ministry with Acre Mill on 30 June 2009, but he continued his ministry with Waterbarn until June 2010 when Waterbarn officially closed as a church.
7. Acre Mill say that, in their opinion, Reverend E was the full time holder of a single office managed by an Appointments Committee authorised and appointed by both

churches, and was not 'employed' by the two churches separately. Reverend E was continuously employed for the whole of his ministry by a single employer from 1 September 2004 to June 2010, and that the modification of his Terms of Appointment, on 30 June 2009, did not constitute a cessation event. A cessation event did not occur until Waterbarn closed in June 2010.

8. Acre Mill also say that both churches were Unincorporated Associations during the period of Reverend E's ministry. It is their understanding that an Unincorporated Association has no legal personality and no contract can be made with the association itself but the rules of agency must be applied to identify the individuals who are liable as principals in the contract. In this case, it is clear that the principals to the Terms of Appointment of 2004 were the members of the Appointments Committee consisting of the Deacons of both churches.
9. When Acre Mill was unable to support the arrangement in 2008, Waterbarn agreed to continue with the provisions of the original Terms of Appointment. No new terms were issued and Waterbarn continued with the financial arrangements under the same accounts that had existed since September 2004. Acre Mill consider this to be a modification of the original arrangement rather than the ending of the original one and the start of a new appointment.
10. At this point the Deacons of Acre Mill withdrew from the Appointments Committee but those who had been appointed by Waterbarn continued as before. No new arrangements were made or new members added.
11. In this regard, Acre Mill believes that the judgment in *Affleck v Newcastle MIND*[1999] ICR 852, EAT applies. This concluded that employees of an unincorporated association were employed by the members of the executive committee for the time being in whom the management function of the association was vested. Consequently, employees had continuity of employment despite changes in the composition of the executive committee which constituted their employer. There was no requirement to novate a contract upon changes to the executive committee. Acre Mill conclude that as Waterbarn continued in the role of employer until their closure in June 2010, it was at this point that the cessation event occurred.
12. Waterbarn had only small resources and did not own their own building. However, the Waterbarn trustees had a legal agreement in place for a substantial share of the proceeds of the sale of an adjoining playing field which had formerly belonged to them and which had potential for a housing development. Acre Mill does not know if the Trustee of the Scheme pursued this asset as a means of settling any Section 75 debt.
13. The Trustee says it recognises how challenging the position is for many of the churches and the importance of protecting its own position. However, the Trustee does not accept Acre Mill's arguments and believes it was an employer of Reverend E jointly with Waterbarn until June 2009. The decision to appoint Reverend E jointly was made by the churches acting together in their capacity as trustees with the

authorisation of their respective church. The Trustee is aware of the legal status of both churches as Unincorporated Associations, and the church trustees have potentially unlimited personal liability which extends to any unpaid pension deficits.

14. Although Baptist churches are “managed” on a day to day basis by the trustees/elders, those trustees/elders are appointed by the vote of the church membership. It is a basic principle of Baptist church governance that the church membership as a whole makes decisions for the church and the organisation’s constitution will require that key decisions are made by the church meeting. The church trustees are then instructed to carry out the wishes of the church meeting. The trustees of Acre Mill and Waterbarn who formed the Appointments Committee, were acting on behalf of their respective church meetings in the joint appointment of Reverend E. They were not acting in an independent capacity but as trustees of their churches.
15. Acre Mill has also argued that Reverend E was an “office holder” and not an employee. The Trustee has previously provided information to the Pensions Ombudsman, see PO-774 (Albemarle BC), relating to the employment status of ministers. While for some purposes, a Baptist church minister is an office holder, this is not the case in pensions law. Paragraphs 28-30 of the Ombudsman adjudication on PO-774 confirms this position.
16. The Trustee believes it has acted correctly and fairly in the division of deficit liability between Acre Mill and Waterbarn, in relation to the appointment of Reverend E.

## **Adjudicator’s Opinion**

17. Acre Mill’s complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee. The Adjudicator’s findings are summarised briefly below:-
  - The question of whether a minister is an office holder or an employee was dealt with by the previous Pensions Ombudsman who said, in PO-774, “So I find that the Church was to be regarded as the employer of its ministers for the purposes of the employer debt regulations.”
  - It is clear from Reverend E’s Terms of Appointment that his ministry was to be shared between Acre Mill and Waterbarn and that they were to equally share the cost of the ministry. The Adjudicator also felt It was clear that if Reverend E had ended his ministry with both churches at the same time then there would be no argument that any Section 75 debt should be shared equally between the two churches.
  - However, Acre Mill argued that since Reverend E’s ministry continued with Waterbarn alone for another year, from June 2009, then they alone should be responsible for any Section 75 debt. Acre Mill have referred to the Appointments Committee as being ultimately responsible for Reverend E’s

appointment. Acre Mill also say, that as the Appointments Committee continued after June 2009, then a cessation event only occurred in June 2010, when Reverend E's appointment terminated. As the Appointments Committee then only consisted of Waterbarn officials, the Section 75 debt should fall to them. But, Adjudicator thought that would be inequitable as the debt was accrued jointly by both churches up until June 2009; and Waterbarn are solely responsible for the further debt accrued for Reverend E's continued ministry from June 2009 to June 2010. The Trustee has confirmed that the Section 75 debt has been apportioned in this manner.

- The Adjudicator concluded that a cessation event had occurred when Reverend E ceased his ministry with Acre Mill in June 2009, and a further cessation event occurred for Waterbarn when his ministry ended with them in June 2010.

18. Acre Mill did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Acre Mill have provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Acre Mill for completeness.

### **Ombudsman's decision**

19. Acre Mill say that they do not feel that enough consideration has been given to the strict legal position of the status of the churches as unincorporated associations. Throughout the discussion with the Trustee and the Adjudicator, the word 'Church' has been used fairly loosely and with different meanings; it should have had a consistent and specific meaning throughout, that is, the group of Trustees appointed and authorised to manage the ministry of Rev E – the Appointments Committee. Acre Mill also say that churches cannot employ or enter into contracts in their own right and maintain the stance that the Appointments Committee were, in effect, a single employer throughout the ministry of Rev E.
20. Acre Mill also say that they accept that an Office Holder is an employee for the purpose of pensions law but have referred to the *Pilots National Pension Fund v Taylor* [2010] judgment, [381(b)], in which Warren LJ extracts a definition of 'employer' from a range of existing legislation as:

"In relation to an office holder, it is the prescribed person or, in default, the person responsible for paying the office-holder".

As both churches were Unincorporated Associations and thus had no legal personality, the identity of the 'prescribed person' and the 'person responsible' must mean some other legal personality. Acre Mill also believe that any legal action before 2009 would have been taken against the members of the Appointments Committee jointly and severally. Therefore, this interpretation would be consistent with their opinion that the Appointments Committee was a single employer.

21. I can understand Acre Mill's concerns over the requirement to meet the Section 75 debt liability and the impact that this will have. However, I am not persuaded that the Appointments Committee is the 'employer' for the purposes of the Section 75 debt. The Appointments Committee was made up of representatives of both Acre Mill and Waterbarn and, as the Trustee has pointed out, the trustees of Acre Mill and Waterbarn who formed the Appointments Committee, were acting on behalf of their respective church meetings in the joint appointment of Reverend E. They were not acting in an independent capacity but as trustees of their churches. It is also clear that the funds to finance Reverend E's ministry were provided jointly by both churches and not from the Appointments Committee itself.
22. I have in the appendix set out the HMRC position on unincorporated associations taken from the Gov.UK website. It is clear from this that an unincorporated association can be responsible for any debts incurred from contractual obligations albeit the appointment was made by a separate Appointments Committee. Also, taking into account the extract by Warren LJ, paragraph 20 above, I find that the phrase, "...in default, the person responsible for paying the office-holder", would mean that as Acre Mill and Waterbarn were paying for Reverend E's ministry they were in effect his employer.
23. Thus I find that Acre Mill and Waterbarn are jointly responsible for paying for the Section 75 debt for the period up to June 2009 and Waterbarn alone for the further period to June 2010.
24. Therefore, I do not uphold Acre Mill's complaint.

**Anthony Arter**

Pensions Ombudsman  
28 July 2017

## **Appendix**

### Unincorporated associations

An 'unincorporated association' is an organisation set up through an agreement between a group of people who come together for a reason other than to make a profit (for example, a voluntary group or a sports club).

You don't need to register an unincorporated association, and it doesn't cost anything to set one up.

Individual members are personally responsible for any debts and contractual obligations.